Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

EARL JAY WILSON,

Petitioner,

vs.

DONALD R. HILL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES M. BONNEAU
Counsel of Record
980 Ninth Street
Suite 1400
Sacramento, CA 95814
Telephone (916) 444-8828
Fax (916) 441-5810

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

44PP

QUESTIONS PRESENTED FOR REVIEW

The question presented to this Court is whether a certificate of appealability should be issued. The following issues are suitable for consideration by the Circuit Court of Appeals. It is therefore necessary that this Court issue the requested Writ and direct the Circuit Court of Appeals to hear the matter.

1. Whether the Anti-Terrorism and Effective Death Penalty Act properly applies to a petition which was initially filed prior to the effective date of the Act.

2. Whether the state prosecutor violated the duty to divulge exculpatory evidence by failing to report that the child victim was under mental health treatment for conduct related to Petitioner's claim that the child was sexually aggressive.

3. Whether the failure to divulge this exculpatory evidence was excused by defense counsel's failure to obtain the same information directly from the counselor.

4. Whether there was a denial of due process and the right to confrontation by the exclusion of the testimony of the mental health counselor.

PARTIES TO THE PROCEEDING

Other than listed above, the only additional party is Respondent Dan Lundgren, Attorney General of California.

RELATED CASES

There are no cases related to the present Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, EARL JAY WILSON, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, No. 98-56103. The judgment of the Court of Appeals denied a certificate of appealability from a judgment of the United States District Court for the Central District of California, No. CV 96-03251-SVW (RZ).

OPINION BELOW

A copy of the order below from the United States Court of Appeals for the Ninth Circuit, No. 98-56103, is attached to this Petition. (Appendix 1.) The order was filed on August 20, 1998. The request for Certificate of Appealability was denied in the district court by orders filed on June 25, 1998 (Appendix 2) and July 29, 1998 (Appendix 3-6).

The Report and Recommendation of the United States Magistrate Judge, filed January 29, 1998, is attached at Appendix 7-21. The Judgment and Order of the United States District Judge adopting the Report and Recommendations was filed June 12, 1998, and are attached at Appendix 22, 23.

STATEMENT OF JURISDICTION

The district court had original jurisdiction over this case pursuant to Title 28 U.S.C. §2254. The circuit court of

appeals had jurisdiction to consider the application for certificate of appealability under 28 U.S.C. §2253(c)(2).

This Court has jurisdiction on certiorari pursuant to 28 U.S.C. §1254(1) and Rule 17 and following, Rules of the Supreme Court of the United States. See *Hohn v. United States*, __U.S.___, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution guarantees the right to due process in state criminal proceedings. The right to confrontation is guaranteed by the Sixth Amendment.

STATEMENT OF CASE AND FACTS

The following summary of facts is taken verbatim from the opinion of the state court of appeal. The victim, who was 12 years old at the time of trial in 1990, testified she was nine years old in the summer of 1987 when defendant lived with her and her mother in a mobile home in Lake Hughes. During the summer of that year, defendant rubbed her vagina after talking about sex. Later during the summer of 1987, he once again rubbed her vagina while they were in his motor home. At the end of the summer a third incident occurred. Defendant showed her a copy of Hustler Magazine. Defendant placed her hand on his penis and he eventually ejaculated. Defendant denied participating in the sexual conduct; however, he indicated the child was sexually

aggressive and wanted to engage in sexual conduct with him. When interviewed by a deputy sheriff before his arrest, defendant claimed on one occasion the child, who "had a high sex drive," attempted to orally copulate him. [End.]

Petitioner was tried twice in state court on three counts of lewd and lascivious conduct in violation of Cal. Penal Code §288. In the first trial the jury hung eleven to one for acquittal. In the second trial he was convicted on all three counts.

The alleged victim was Petitioner's stepdaughter, who lived with Petitioner for several years prior to the rancorous breakup of the relationship between Petitioner and the girl's mother. The girl's mother filed for a restraining order against Petitioner, and Petitioner responded by serving a subpoena on the alleged victim. It was at that point that the allegation of molestation emerged. "It led to us sitting down to discuss our fears, and she disclosed to me that Mr. Wilson had been molesting her while we had been living with him. And we chose to call the sheriffs and report it." Reporter's Transcript of Jury Trial, testimony of victim's mother, p. 73.

However, this was not the first time that the girl's conduct had been a matter of concern to the mother, and it was not the first time that the girl was given the opportunity to report any inappropriate conduct by Petitioner. The declaration of Joan Ganey, M.F.C.C., states in part as follows.

> . . . 2. Between October 2, 1984 and November 5, 1984, [victim's mother] retained my services because she was concerned over the

> relationship developing between her daughter [victim] and [the mother's] boyfriend Earl Wilson [Petitioner]. At no time did I interpret this concern to be of a sexual nature. My impression at the time was that [the mother] was possibly jealous over the relationship between her new boyfriend and [the victim].
>
> 3. During our counseling sessions, Melissa never once complained of, or alleged, that Earl Wilson had molested her or had touched her improperly. If she had, I would have reported such acts to the proper authorities as I am required to do.

(Declaration of Joan Ganey, February 16, 1995, Additional Exhibit to Respondent's Answer to Petition for Writ of Habeas Corpus, filed in U.S. District Court on June 5, 1996.)

According to a declaration dated August 5, 1996, deputy district attorney Joseph D. Payne, III, stated that he had phone contact with Joan Ganey prior to the first or second trial. Ms. Ganey said that she had thrown away her notes, but made several categorical statements about the content of her sessions with Melissa. (See Respondent's Supplemental Answer to Petition for Writ of Habeas Corpus; Exhibits Including Declaration of Joseph D. Payne III, filed in the district court on August 9, 1996.)

It was the content of Ms. Ganey's declaration, ignored by the state courts, which forms the gravamen of Petitioner's present arguments.

SUMMARY OF ARGUMENT

This Court has reviewed the standard for issuance of certificates to pursue an appeal, formerly denominated certificates of probable cause and now referred to as certificates of appealability. In order to appeal from the denial of relief, the petitioner in habeas corpus must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Lozada v. Deeds*, 498 U.S. 430 (1991); *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983). The same standard is to be applied to certificates of appealability. *Carson v. Director of the Iowa Dept. of Correctional Services*, 150 F.3d 973, 975 (8th Cir. 1998); *Hardwick v. Singletary*, 126 F.3d 1312 (11th Cir. 1997).

Appellate review is necessary in this case because Petitioner is an innocent man who was convicted on testimony which was not sufficiently examined or corroborated or subject to review. As eleven members of the first jury recognized, the credibility of this child witness was strained. The report of sexual misconduct did not come until about two years after the supposed events. The girl's testimony was not corroborated by medical testimony or any other witness accounts. Moreover, and most important to this issue, the girl's mother was embroiled in arguments with Petitioner over the mother's claim to Petitioner's property. This was the volatile backdrop to the girl's contrived testimony of sexual misconduct by Petitioner.

The legal issue in this case goes to the crux of the issues before the jury. Petitioner took the stand in his own defense, and testified that the girl had been sexually aggressive and acting out in his presence. The opinion of the state court of appeal referred to this testimony as "preposterous." Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five, No. B057130, p. 5, Exhibit B to Respondent's Answer to Petition for Writ of Habeas Corpus.

Yet, unknown to the defense or the jury, the girl had been taken to a counselor in order to address the girl's inappropriate flirtation with the defendant. Had the jury known of this, they would not have viewed as "preposterous" Petitioner's claim that the girl had been sexually inappropriate around him. Moreover, the girl's failure to mention sexual molestation, in the surroundings of the counselor's office which should have encouraged the airing of such a complaint, would have been viewed as highly significant by any reasonable jury.

The legal issue is certainly one which is debatable among reasonable jurists. Here we see the state prosecutor concealing information that the complainant had been taken to a counselor to address issues including the child's inappropriate behavior around Petitioner. If defense counsel had known of this, he could have demonstrated the admissibility of the counselor's testimony by demonstrating its non-hearsay purpose. The state should not be permitted to use the excuse that the defense failed to make the proper showing or comply with notice requirements, when it was the prosecutor's withholding of information which made such a showing impossible. The question is, at a minimum, debatable among reasonable jurists.

ARGUMENT

Introduction

This case poses several constitutional issues, all of which are related to the same basic factual allegation. That is, on his state court trial Petitioner was denied the right to present evidence which would have established that the alleged victim of this sexual offense had been taken to counseling before she made any allegations against Petitioner. The purpose of the counseling, initiated by the girl's mother, was to deal with her inappropriate behavior toward Petitioner. Petitioner claimed in his testimony that the victim was sexually aggressive and inappropriate. Without the information from the counselor, his testimony was viewed as implausible by the reviewing court, and undoubtedly by the jury as well.

The constitutional issues, which deserve review at the appellate level, include (1) the improper retroactive application by the district court of the standard of review set forth in the Anti-Terrrorism and Effective Death Penalty Act (AEDPA); (2) the improper rejection of Petitioner's *Brady* claim despite the prosecutor's cover-up of his knowledge regarding the counselor's information; (3) the lack of effective assistance of counsel for failure to pursue the leads which were available regarding the counselor; and (4) the denial of confrontation and due process from the trial court's use of state evidentiary rules to exclude exculpatory defense evidence. The certificate should issue to permit appellate review of these issues.[1]

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[1] The district court, App. 10, found that one of Petitioner's claims was unexhausted, so that the entire petition could be

ARGUMENTS ON APPEAL

1. THE DISTRICT COURT IMPROPERLY APPLIED THE PROVISIONS OF THE AEDPA.

It is settled that the AEDPA does not apply to habeas corpus petitions filed in the district court prior to April 24, 1996, the effective date of the Act. *Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

Here, Petitioner filed a first petition on January 5, 1996, prior to the effective date of the Act. CV 96-0075 SVW (E). That petition was dismissed by the district court because Petitioner's state habeas corpus petition, filed in the California Supreme Court on October 16, 1995, was still pending there. The state petition was denied on March 13, 1996.

On May 5, 1996, Petitioner filed an identical petition, which was given case number CV 3251 WDK (E). The district court applied the AEDPA to the resolution of Petitioner's claims. Report and Recommendations, pp. 4-5. Specifically, the district court accorded a high degree of deference to the judgment of the state courts. 28 U.S.C. §2254(d).

Since Petitioner's first petition was filed prior to the effective date of the Act, the provisions of the Act should

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dismissed as a mixed petition. However, the district court did not base its decision on this ground. If the district court had disposed of the matter on exhaustion grounds, then Petitioner could have chosen either to amend his petition or return to state court. Since the district court did not afford him that opportunity, the appellate court should have reached the issues on the merits.

not have been applied to his case. The district court (App. 11) applied the Act to give a high degree of deference to the state court resolution of Petitioner's complaints. The former version of 28 U.S.C. §2254(d) did not call for such deference.

This issue was resolved in favor of the state inmate petitioner by the Seventh Circuit in *Burris v. Parke*, 95 F.3d 465, 469 (7th Cir. en banc 1996). The issue has not been addressed by the Ninth Circuit. The present appeal should be allowed in order that the Ninth Circuit can address the question of the application of the AEDPA to identical filings.

2. PETITIONER WAS DENIED ACCESS TO EXCULPATORY INFORMATION IN VIOLATION OF THE RULE OF *Brady v. Maryland*, 373 U.S. 83 (1963).

The district court points out that the defense knew of the existence of Ganey early on, and concludes that "[t]here can be no *Brady* violation where the evidence in question was already known to the defense." Report and Recommendation, App. 13.

It is true that Petitioner knew of the existence of Ganey, since he lived with the alleged victim and her mother when the girl was taken to counseling. It does not follow that he knew or could find out the contents of Ganey's counseling sessions with Melissa. The counselor was under no obligation to speak to Petitioner or to any defense investigator.

However, according to a declaration executed by the prosecutor, Ganey spoke to *him* about the contents of the counseling sessions. This was *Brady* material. The failure to disclose it prevented the defense from offering the statements into evidence; the defense could not overcome a hearsay objection because the defense did not know that the counseling sessions contained non-hearsay information.

This issue (knowledge of the witness versus knowledge of the statement) would seem to be resolved by the *Brady* opinion itself. The suppressed evidence in *Brady* was the confession of the co-defendant. The state petitioner obviously knew who his co-defendant was, but he did not know that the co-defendant had made a statement, or the contents of the statement. It is not enough that the defendant merely know the identity of the potential witness, the defendant must be informed of the nature and contents of the witness' statement. Nevertheless, since this aspect of the *Brady* rule apparently escaped the district court, it merits review by the appellate court.

Moreover, in *Strickler v. Greene*, 98-5864, this Court has recently granted certiorari review in order to determine whether a *Brady* claim may be defeated by the argument that defense counsel could have discovered the same information by diligent investigation. Since the district court in this case has determined, albeit incorrectly, that defense investigation could have uncovered the same information withheld in the district attorney's files, this issue is particularly appropriate for appellate review pending this Court's decision in *Strickler v. Greene, supra.*

3. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The standard for effective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Here, Petitioner argues that defense counsel should have secured the admission of Ganey's testimony over prosecution objections. Since the district court incorrectly seems to assume (App. 13) that defense counsel knew the contents of Ganey's statement, it was expected that counsel should have argued that the statement had a non-hearsay purpose, to impeach the testimony of the alleged victim and her mother. The mother, according to Ganey, had concluded that the girl's conduct was inappropriate. This partially corroborated the defendant's testimony. Moreover, the child failed to make a complaint in circumstances where she was protected and where a timely complaint would be expected.

As set forth above, defense counsel did not have access to Ganey's statement and potential testimony because of the *Brady* violation. However, if the district court is correct that he had access (or could have gained access over the bar of confidentiality in some unexplained fashion) then it was ineffective assistance of counsel to fail to properly offer the exculpatory evidence.

4. THE RIGHTS TO DUE PROCESS AND CONFRONTATION WERE DENIED BY THE EXCLUSION OF EXCULPATORY EVIDENCE.

In *Chambers v. Mississippi*, 410 U.S. 284, 297-298, 302-303 (1973), this Court held that it was a denial of confrontation and due process to utilize a state hearsay

rule to exclude the confession of a witness called by the defense. In the present case the state abused statutory hearsay and notice rules to exclude the impeaching testimony of Joan Ganey, M.F.C.C.

The district court (App. 20) relied upon state hearsay and statutory notice requirements to obviate any federal constitutional error. In fact, these rules have been utilized to deny confrontation and due process.[2]

If defense counsel had been privy to Ganey's statement, he would have been able to establish a non-hearsay purpose for the introduction of her testimony. The purpose of the impeaching testimony would be to demonstrate that the girl's mother was concerned about the abnormal attention that the girl showed toward her mother's boyfriend. This is a non-hearsay purpose. *People v. Jackson*, 49 Cal.3d 1170, 1187 (1989). It would have had a powerful effect of buttressing the defendant's claim that Melissa's conduct around him was abnormal.[3] The

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[2] Allusion is made to Calif. Evidence Code §1035.4, providing for confidential communication with a sexual assault counselor. App. 16. This provision has not been used by the state courts to shield Ms. Ganey's information from the defense. Ms. Ganey has made it clear that she is not a sexual assault counselor, she does not run a rape crisis center (see Cal. Evid. Code §1035.2), and she considers herself bound by California's mandatory reporting requirement. (Cal. Pen. Code §§11164 et seq.)

[3] Without the information of what Ganey would have testified to, the state court of appeal referred to her testimony as "this devastating area of inquiry." (p. 8 of opinion of Second District Court of Appeal, filed November 13, 1992, attachment to Respondent's Answer to Petition for Writ of Habeas Corpus, filed in the district court on May 29, 1996.)

evidence, had it not been concealed from the defense, would have been highly relevant and admissible over a hearsay objection.

For similar reasons, without knowing the content of Ganey's statement, the defense could not comply with the notice requirements of Calif. Evidence Code §782, which requires prior notice and hearing on evidence of prior sexual conduct by the complaining witness. Again, the *Brady* violation effectively shut the door on the defense effort, and the state courts have built upon the *Brady* violation by assigning a waiver because of the defense lack of information on the subject.

This issue, too, should be reviewed for a constitutional violation under *Chambers v. Mississippi, supra.*

CONCLUSION

For the reasons stated, a certificate of appealability should be issued for review of Petitioner's claims.

Date: November 17, 1998

Respectfully submitted,

CHARLES M. BONNEAU
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL JAY WILSON,

Petitioner,

vs.

DONALD R. HILL, Warden CCI; et al.,

Respondents.

No. 98-56103

DC# CV-96-3251-SVW
Central California

ORDER

(Filed Aug. 20, 1998)

Before: RYMER and HAWKINS, Circuit Judges

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Earl Jay Wilson, Petitioner, vs. Donald R. Hill, Respondent.	CASE NO. 96-3251 SVW(RZ) ORDER RE: CERTIFICATE OF APPEALABILITY (Filed Jun. 25, 1998)

On June 22, 1998 Petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

[ ] The Certificate of Appealability is GRANTED. The specific issue(s) satisfy §2253(c)(2) as follows:

_____

_____

_____

[X] The Certificate of Appealability is DENIED for the following reason(s):

[X] There has been no substantial showing of the denial of a constitutional right.

[ ] The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.

[ ] The appeal seeks to test the validity of the detention pending removal proceedings.

DATED: 6/25/98

/s/ Steven V. Wilson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EARL JAY WILSON,

Petitioner,

vs.

DONALD R. HILL, et al.,

Respondents.

CASE NO.
CV 96-3251-
SVW(RZ)

ORDER DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY

(Filed Jul. 29, 1998)

Petitioner filed this habeas petition on May 6, 1996. This Court considered the matter and denied the Petition, entering its Judgment dismissing the action on June 15, 1998. Petitioner now seeks a certificate of probable cause. As set forth in more detail below, this Court denies Petitioner a certificate of appealability, which is what the Court assumes Petitioner in fact seeks.

Under the Antiterrorism and Effective Death Penalty Act, P.L. 104-132, the district court no longer makes a certification as to probable cause to take an appeal in a habeas corpus case, as it did under prior law. Instead, a "circuit justice or judge" determines whether to issue a certificate of appealability, before an appeal can be taken. 28 U.S.C. § 2253(c). Section 2253(c) provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In *United States v. Asrar*, 116 F.3d 1268 (9th Cir. 1997), the Ninth Circuit held that district courts are empowered under § 2253 to determine whether a certificate of appealability should issue.

Prior to the AEDPA, the habeas statute contained a requirement that an appealing petitioner first obtain a certificate of probable cause. The Ninth Circuit has not determined the ways in which a certificate of appealability differs from the former certificate of probable cause, but it has stated in dictum that the certificate of appealability's requirements are more demanding. *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). At least one other circuit has disagreed, ruling that only the terminology, not the standard for certifying appealability, changed with the enactment of the new statute. *Lennox v. Evans*, 87 F.3d 431, 434 (10th Cir. 1996).

Without determining the ways in which the new statute is more demanding than the old one, it is clear that Petitioner has not satisfied the standard for a certificate of probable cause under the former statute, and therefore could not satisfy the new statute's requirement

that a certificate of appealability issue only if the applicant "has made a substantial showing of the denial of a constitutional right." Under the former statute, a certificate of probable cause issued only upon "a substantial showing of the denial of a federal right." *Lynch v. Blodgett*, 999 F.2d 401, 403, (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1197 (1994), *quoting Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). This meant that a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Greenawalt v. Steward*, 105 F.3d 1268, 1273 (9th Cir. 1997), *quoting Barefoot v. Estelle*, 463 U.S. at 893 n.4. Petitioner cannot satisfy this standard, and therefore could not satisfy a more stringent standard for issuance of a certificate of appealability.

The Court considered each of Petitioner's grounds for habeas relief, and concluded that none of the claims presented a ground for relief. In fact, the Petition could have been dismissed as unexhausted, except for the fact that it was clear that the Petition lacked merit and, accordingly, it would be a poor use of judicial resources to require that Petitioner first return to the state courts. The Petition did not raise questions which deserve further development in the appellate court.

Accordingly, the standard for the issuance of a certificate of proximate cause has not been met and therefore the more stringent standard, under the AEDPA, for the issuance of a certificate of appealability, also has not been met.

Petitioner's request for a certificate of probable cause, or for a certificate of appealability, is DENIED.

DATED: July 29, 1998

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Ralph Zarefsky
RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EARL JAY WILSON, Petitioner, vs. DONALD R. HILL, et al., Respondents.	Case No. CV-96-3251-SVW (RZ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Jan. 29, 1998)

Pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California, the undersigned submits this Report and Recommendation to the Honorable Stephen V. Wilson, United States District Judge. The undersigned recommends that the Petition for Writ of Habeas Corpus be denied and that this action be dismissed with prejudice.

1. BACKGROUND

On February 15, 1991, Earl Jay Wilson was convicted in Los Angeles County Superior Court of three counts of lewd conduct with a child under fourteen, in violation of California Penal Code § 288(a). In 1987, Wilson allegedly had molested nine-year-old Melissa Henthorn, the daughter of Wilson's former girlfriend, Beverly Eder. Wilson was sentenced to 10 years in state prison. Subsequently, Wilson appealed to the California Court of Appeal, which affirmed the conviction. The California Supreme Court denied review. On October 16, 1995, Wilson petitioned the California Supreme Court for a writ

of habeas corpus. That petition was denied. On May 6, 1996, Wilson filed the present Petition for Writ of Habeas Corpus.

2. THE COURT SHOULD REACH THE MERITS OF THE PETITION NOTWITHSTANDING THAT THE PETITION CONTAINS AN UNEXHAUSTED CLAIM

In opposing Wilson's petition, the State first argues that Wilson has not exhausted his state court remedies and, therefore, the Court should not even reach the merits of Wilson's claims. Wilson's petition asserts that the trial court erroneously suppressed exculpatory testimony bearing on the credibility of the prosecution's key witness. Wilson also argues that he received ineffective assistance of counsel because his appellate attorney failed to investigate and present the suppression issue on appeal. The State argues that Wilson never presented to the California Supreme Court any federal law basis for his claim that the trial court made an erroneous evidentiary ruling in excluding the evidence. The State further argues that Wilson never made the claim that his appellate counsel failed to raise the suppression issue on appeal. Therefore, the State maintains, Wilson has raised unexhausted claims, and his petition must be dismissed.

The State is wrong as to the ineffective assistance of appellate counsel claim. In the brief accompanying his habeas petition to the California Supreme Court, Wilson argued that his "trial and/or appellate counsel failed . . . 4) to properly argue the law concerning the doctor-patient privilege in order to overcome the trial

court's unlawful exclusion of certain critical evidence based on such privilege." State Habeas Petition Brief at 3-4. Wilson's brief described the testimony which he felt was improperly excluded and why the exclusion was improper. *Id.* at 7-8. Wilson concluded that his "[d]efense counsel failed to see this and appellate counsel failed to challenge this on appeal. Both were obviously ineffective." *Id.* This claim is essentially the same as the claim raised in the present petition in which Wilson argues that his appellate counsel failed "to investigate and present the critical 912/1035.4 evidence suppression issue on direct appeal." Habeas Petition at 7. Accordingly, Wilson's claim of ineffective assistance of appellate counsel has been exhausted.

That is not so, however, as to Wilson's claim that the trial court erroneously suppressed impeachment testimony. The Supreme Court has held that "[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." *Duncan v. Henry*, 513 U.S. 364, 366 (1995). The Ninth Circuit has interpreted this language to mean that "[i]f a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court." *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).

Wilson argued in his petition to the California Supreme Court that the "[t]rial court erred by unlawfully suppressing the exculpatory testimony of Joan Ganey." State Habeas Petition at 4-2. Wilson did not cite in either

the petition itself or in the brief accompanying the petition any provision of the United States Constitution or any federal law, citing instead only the California state court cases of *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956), *People v. Woodard*, 23 Cal. 3d 329, 152 Cal. Rptr. 536 (1979), and *People v. Reeder*, 65 Cal. App. 3d 235, 135 Cal. Rptr. 421 (1976). Therefore, it appears that Wilson has not compiled with the requirements of *Duncan* and *Zenon* in that he has not presented to the state court a federal law basis for his claim. As such, Wilson's petition contains a claim which is unexhausted.

Generally, a federal court presented with a habeas petition containing both exhausted and unexhausted claims should dismiss the entire petition without prejudice. *See* 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509, 510 (1982). However, the Supreme Court has held that it is appropriate to address the merits of a habeas petition notwithstanding the failure to exhaust available state remedies where "the interests of comity and federalism will be better served by addressing the merits forthwith." *Granberry v. Greer*, 481 U.S. 129, 134 (1987). Thus, if a federal court is convinced that the petition has no merit, the exhaustion rule should not be applied because it would only result in useless litigation in the state court. *Id.* at 133. Congress has codified the holding in *Granberry* by authorizing the denial of a petition on the merits despite failure to exhaust state remedies. *See* 28 U.S.C. § 2254(b)(2). In this case, the claims of the Petitioner are without merits. Accordingly, the Court should reach the merits of the petition notwithstanding the failure of the Petitioner to exhaust his remedies in state court.

3. STANDARD OF REVIEW

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, became effective, substantially amending the habeas statute, 28 U.S.C. § 2254. The new section 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

As discussed above, all of Wilson's claims, save one, were previously addressed and disposed of on the merits by the California courts in habeas proceedings. Therefore, with respect to most of Wilson's claims, the Court is required to give to the findings of the California courts the deference required by section 2254(d).

4. PETITIONER'S CLAIMS LACK MERIT

a. The Allegation of Prosecutorial Misconduct

In Ground One of his petition, Wilson argues that the prosecutor engaged in misconduct through the "gross

and intentional suppression of substantial material evidence bearing on the credibility of the key prosecution witness." Petition at 6. The "substantial material evidence" was the potential testimony of Joan Ganey, a Marriage, Family, and Child Counselor. Wilson, Eder, and Melissa had seen Ganey in 1984 for counseling sessions. Part of Wilson's defense at trial was that Melissa was a sexually aggressive child and that Melissa initiated any inappropriate touching. Wilson argues that, based on her evaluation of Melissa at the counseling sessions, Ganey could have substantiated Wilson's claims, but that "the prosecutor saw fit to conceal his knowledge of this evidence and to profer (sic) false and misleading information to the trial court in order to induce that court, to suppress that facts surrounding Ms. Ganey's counseling, prevent her from testifying, and to block any reference to her or to the counseling." Petition at 6-6a. This conduct, according to Wilson, violates the "*Brady* Rule," California Evidence Code §§ 912 and 1035.4, California Penal Code § 1054.1, and California Constitution Article I, Section 28, Clause (d).

To warrant habeas relief, prosecutorial misconduct must have been so egregious as to have infected the entire trial fatally, rendering it fundamentally unfair and denying the petitioner due process. *Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1549 (1996). A *Brady* violation occurs when the prosecution fails to disclose evidence favorable to an accused which is material either to guilt or punishment. *Paridis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997). A federal court may not issue a writ of habeas corpus on the basis of a perceived error of state law. *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

According to the prosecutor, the State first learned about Joan Ganey "sometime around the commencement of trial when Mr. Wilson's trial attorney mentioned her as a potential defense witness." Declaration of Joseph D. Payne III. Wilson disputes this account. Petitioner's Traverse/Denial to supplemental Answer at 1. However, Wilson concedes that *both* sides knew about Ganey as early as the preliminary hearing, and he does not dispute that the *defense* contemplated calling Ganey as a witness at the start of the trial. *Id.* The *Brady* rule is based on a defendant's need to know about any exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). The essence of a *Brady* violation is the failure of the prosecutor to reveal to the defense evidence of which the defense is unaware. There can be no *Brady* violation where the evidence in question was already known to the defense. Thus, Wilson's claim of a *Brady* violation lacks merit.

The record also refutes Wilson's claim that the prosecutor induced the trial court to suppress Ganey's testimony by offering false and misleading information. Before trial, the prosecution made a motion in limine to exclude any reference to allegations that Melissa had been diagnosed by Ganey as being sexually aggressive. Reporter's Transcript, 1/14/91, at 3. The prosecutor argued that any such testimony would be hearsay (to the extent Ganey herself was unavailable) and that any such testimony would violate California Evidence Code § 1035.4, which protects confidential communications between a sexual assault counselor and a sexual assault victim. *Id.* The court granted the motion in limine, ruling that any testimony regarding Melissa's alleged sexual

aggressiveness would be hearsay, irrelevant, and barred because the defense had not complied with their requirements of California Evidence Code § 782 (establishing procedure for admitting evidence of sexual conduct of a complaining witness). *Id.* at 4-6.

Wilson now argues that it was misconduct for the prosecutor to make the motion in limine at all. He says that section 1035.4 was clearly inapplicable because Ganey was not a sexual assault counselor and/or because the privilege had been waived pursuant to California Evidence Code § 912. However, to constitute a due process violation, prosecutorial misconduct must be so severe as to result in the denial of the defendant's right to a fair trial. *Bonin v. Calderon*, 59 F.3d 815, 843 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 718 (1996). Furthermore, the actions of the prosecutor must be considered in the context of the entire trial. *Rose v. Duckworth*, 769 F.2d 402, 405 (7th Cir. 1985). The trial court did not grant the motion in limine on the basis of section 1035.4 – the ground presented by the prosecutor. Any alleged misconduct by presenting that ground, therefore, created no prejudice.

Finally, Wilson's argument that the conduct of the prosecutor violated California Penal Code § 1054.1 (disclosure of materials to defendant by prosecution) and/or provisions of the California Constitution encompasses purely issues of state law and is beyond the scope of review of a federal court. *Pulley*, 465 U.S. at 41.

Accordingly, Wilson's claim of prosecutorial misconduct lacks merit in its entirety.

b. The Allegation of Ineffective Assistance of Trial Counsel

Wilson next asserts that he received ineffective assistance of counsel from his trial attorney. Such a claim has two components: (1) the petitioner must show that counsel's performance was deficient, and (2) the petitioner must show that the deficient performance prejudicated the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Wilson can show neither.

To establish deficient performance, the petitioner must show that the attorney made errors to serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* The proper standard for evaluating attorney performance is that of reasonably effective assistance. *Id.* It is not enough for the petitioner merely to criticize the attorney's trial tactics. *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1254 (9th cir. 1986). Moreover, a court cannot second-guess an attorney's strategic decision when such decision was reasonable under the circumstances. *United States v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990). Review of counsel's performance is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation. *Ferreira-Alameda*, 815 F.2d at 1253. To overcome this presumption, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. This generally requires a showing of "gross incompetence" on the part of the attorney. *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

To establish prejudice, the petitioner must show that counsel's errors were so serious as to deprive the defendant of a fair trial – that is, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Thus, the petitioner must show that there is a reasonable probability that, if not for counsel's errors, the result of the proceeding would have been different. *Chambers*, 918 F.2d at 1460. The prejudice component of the ineffective assistance of counsel test focuses, therefore, on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

The first factor which Wilson cites as constituting ineffective assistance of trial counsel is his attorney's "total ignorance" of California Evidence Code §§ 912 and 1035.4, which "allowed the prosecutor to unlawfully conceal and suppress the testimony of Ganey." Habeas Petition at 7. Wilson believes that his attorney should have argued that section 1035.4 did not protect the communications between Ganey and Melissa because Ganey was not a sexual assault counselor. Wilson further believes that his attorney should have argued that any confidentiality was waived pursuant to section 912. However, as noted above, the court granted the prosecutor's motion in limine on ground other than section 1035.4, ruling that any testimony regarding Ganey's diagnosis of Melissa would be hearsay and irrelevant and that the defense had failed to comply with the requirements of California Evidence Code § 782. Therefore, even if Wilson's attorney had based his arguments on section 1035.4 and section 912, the motion to suppress would have been granted anyway. Accordingly, Wilson cannot establish prejudice.

Next, Wilson argues that his attorney failed to call a psychiatric expert witness and to call character witnesses. Complaints based upon uncalled witnesses are not favored in habeas corpus petitions because the presentation of witness testimony is essentially strategic and, thus, within the trial counsel's domain. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). Furthermore, speculation as to what uncalled witnesses would have said is often uncertain. *Id.* In this case, Wilson does not even specify which witnesses should have been called or what they would have said. Therefore, Wilson cannot sustain his burden of showing that his attorney was unreasonably ineffective for not calling such witnesses or that Wilson was thereby prejudiced.

Finally, Wilson argues that his attorney was ineffective for failing "to object to the unlawful suppression by the trial court of substantial material evidence bearing on the credibility of the key prosecution witness." Habeas Petition at 7. Presumably, Wilson refers to testimony regarding Melissa's alleged sexual-aggressiveness, including testimony regarding any diagnosis by Ganey. The record belies this claim. Throughout the proceedings, Wilson's attorney sought to introduce evidence regarding sexual activities of Melissa. As just one example, on January 15, 1991, Wilson's attorney filed a Motion to Offer Proof of Relevance of Sexual Conduct of Complaining Witness. Reporter's Transcript, 1/15/91, at 32. Counsel made other attempts throughout the trial to introduce evidence of Melissa's sexual aggressiveness. The fact that the trial judge rejected these attempts on relevancy grounds does not detract from the fact that Wilson's

attorney diligently tried to present Wilson's defense that the victim was sexually aggressive.

Wilson has made no showing of substandard performance by his counsel, and the claim of ineffective assistance of trial counsel therefore must be denied.

c. The Claim of Ineffective Assistance of Appellate Counsel

Wilson next argues that he received ineffective assistance of counsel from his appellate attorney. The standard for evaluating such a claim is the same as that for evaluating a claim of ineffective assistance of trial counsel – the petitioner must show deficient performance and prejudice. *See, e.g., Morrison v. Estelle*, 981 F.2d 425, 427 (9th Cir. 1992), *cert. denied*, 508 U.S. 920 (1993).

In support of this claim, Wilson first cites the failure of his appellate attorney to file a collateral writ of habeas corpus, along with the direct appeal, in order to raise the claim of ineffective assistance of trial counsel. In California, an attorney for a criminal defendant may file a habeas petition while the direct appeal of the conviction is still pending. *See, e.g., In re Jones*, 13 Cal. 4th 552, 54 Cal. Rptr. 2d 52 (1996). However, the law does not require that an attorney do so. Therefore, Wilson's appellate attorney was under no constitutional obligation to file a habeas petition collateral to the direct appeal to raise the claim of ineffective assistance of trial counsel, particularly since, as discussed above, no basis for that claim exists. Moreover, Wilson suffered no prejudice since he ultimately filed his own habeas petition with the California Supreme Court in which he raised the ineffective

assistance of trial counsel claim. That claim was duly considered by the state court and was rejected.

Next, Wilson cites the failure of his appellate counsel to utilize a psychiatric evaluation during the appeal, to "investigate critical exculpatory evidence," and to interview three specific individuals – Joan Ganey, Dr. Edward Conolley, and Lynda Kushner. Habeas Petition at 7. In California, an appellate court will not review evidence or issues not raised at trial unless the appellant shows good cause for the unavailability of the evidence in the trial court. *Tsakos Shipping & Trading, S.A., v. Juniper Garden Town Homes, Ltd.*, 12 Cal. App. 4th 74, 87, 15 Cal. Rptr, 2d 585, 591-92 (1993). Wilson has not shown good cause for the unavailability of any of the above evidence. Therefore, to the extent that Wilson is arguing that his appellate counsel should have asked the appellate court to consider new evidence, rather than performing the normal appellate function of reviewing the record, Wilson's claim is without merit. Furthermore, Wilson's charge that his attorney failed to "investigate critical exculpatory evidence" is simply too vague to demonstrate ineffective assistance.

Wilson also criticizes his appellate counsel for failing to "investigate and present the critical 912/1035.4 evidence suppression issue on direct appeal." Habeas Petition at 7. Since the trial court did not rely on either section 912 or section 1035.4 in excluding evidence of Ganey's evaluation of the victim, Wilson's appellate counsel properly did not make any argument based on those statutes. Here too, therefore, Wilson has made no showing of either substandard performance on the part of his appellate counsel or of prejudice to himself.

d. The Claim of Unlawful Suppression of Exculpatory Testimony

Finally, Wilson directly attacks the trial court's decision to exclude any testimony regarding Ganey's evaluation and diagnosis of the victim. As Wilson argues: "The trial court unlawfully utilized California Evidence Code section 1035.4 and ignored Evidence Code section 912 to suppress critical exculpatory evidence." Habeas Petition at 7. As noted above, it is unclear what the underpinnings of this claim are as Wilson has failed to cite any federal law as a basis for his argument. To the extent that Wilson's claim is purely that the state trial judge made an incorrect ruling under state evidentiary law, the claim must be rejected; this Court cannot review errors of state law. *Hartman v. Summers*, 120 F.3d 157, 160 (9th Cir. 1997).

To the extent that Wilson's claim can be interpreted as arising under the Due Process Clause of the United States Constitution, the claim still must be rejected. The standard for determining whether habeas relief should be granted in a Section 2254 petition is whether the alleged trial error "had substantial and injurious effect or influence in determining the jury verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Trial errors which do not meet this test are deemed harmless. *Rice v. Wood*, 77 F.3d 1138, 1144 (9th Cir.), *cert. denied*, 117 S.Ct. 191 (1996). In this case, the state trial court did not, as Wilson continues to insist, exclude the testimony of Ganey on the grounds of confidentiality. What the trial court did do was exclude any testimony regarding the sexual history of the victim because it would have been hearsay and irrelevant, and

because the defense did not comply with the state statutory requirements for introducing such evidence. This decision was not erroneous. Even assuming that it was, such error did not substantially influence the jury's verdict.

4. CONCLUSION

IT IS THEREFORE RECOMMENDED that the District Court (1) approve and adopt this Report and Recommendation and (2) direct that Judgment be entered denying the Petition for Writ of Habeas Corpus and dismissing this action with prejudice.

DATED: January 27, 1998.

/s/ Ralph Zarefsky
RALPH ZAREFSKY
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EARL JAY WILSON, Petitioner, vs. DONALD R. HILL, et al., Respondents.	Case No. CV 96-3251-SVW (RZ) JUDGMENT (Filed Jun. 12, 1998)

This matter came before the Court on the Petition of Earl Jay Wilson for a writ of habeas corpus. Having reviewed the Petition and supporting papers, and having approved the Report and Recommendation of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED: 6/10/98

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EARL JAY WILSON, Petitioner, vs. DONALD R. HILL, et al., Respondents.	Case No. CV 96-3251-SVW (RZ) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (Filed Jun. 12, 1998)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

DATED: 6/10/98

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

U.S. Const.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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28 U.S.C. § 2254. State custody; remedies in Federal courts

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.